

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

on behalf of,

Student,
(DOB STARS

Petitioner,

Case No.

Bruce Ryan, Hearing Officer

v.

Hearing: June 4, 2009

Decided: June 14, 2009

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

2009 JUN 15 AM 10:34
STUDENT AGENCY OFFICE

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed on April 14, 2009, on behalf of a year old student (the "Student" or ' who resides in the District of Columbia and attends Petitioner was represented by Carmen Daugherty, Esq., and Respondent District of Columbia Public Schools ("DCPS") was represented by Kendra Berner, Esq., Assistant Attorney General for the District of Columbia. The complaint was brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§ 1400 *et seq.*, and its implementing regulations.

The complaint alleges that DCPS has denied the Student a free appropriate public education ("FAPE") by (a) determining that Academy would be the Student's interim placement despite finding his actions a manifestation of his disability, (b) preventing the Student from receiving any services for approximately three weeks, and (c) not identifying an appropriate placement after the MDT determined on December 12, 2008, that a change of placement from was necessary.

On April 17, 2009, DCPS agreed to waive the resolution session and requested that this case proceed to a due process hearing on the merits. DCPS eventually filed a late response on May 12, 2009. The response asserted that the Student's Multi-disciplinary Team ("MDT") had determined that the Student's behavior was a manifestation of his disability (emotional disturbance), decided on an interim placement at Academy, and reviewed the Student's functional behavioral assessment ("FBA") and behavioral intervention plan ("BIP") on or about 12/12/08. DCPS further stated that it had not yet placed the Student at a new school, but that DCPS could implement the Student's full-time individualized educational program ("IEP") at

The Due Process Hearing was originally scheduled for May 15, 2009. Petitioner filed a consent motion for continuance of the scheduled due process hearing on May 14, 2009, because counsel for Petitioner had been selected to serve on a jury for a criminal trial in D.C. Superior Court beginning May 13, 2009, and the trial was expected to last for up to two weeks. The Hearing Officer found good cause for the motion and granted a continuance of the hearing to June 4, 2009.

A Prehearing Conference ("PHC") was thereafter held on May 26, 2009; five-day disclosures (and supplemental disclosures) were filed by both parties on or about May 11 and May 28, 2009; and a Prehearing Order was issued June 3, 2009. The parent elected for the hearing to be closed.

The Due Process Hearing convened on June 4, 2009. At the hearing, 13 documentary exhibits submitted by Petitioner (identified as -1" through -13") and three (3) documentary exhibits submitted by DCPS (identified as "DCPS-1" through "DCPS-3") were admitted into evidence without objection.

Testifying at the hearing on behalf of Petitioner were: (1) _____ (Parent-Petitioner); (2) Nathaniel Gibson (Caseworker, Universal Daybreak Group Home); and (3) _____ (Admissions Specialist/Evaluation Coordinator, DCPS).
Testifying for DCPS was _____ (Special Education Coordinator, DCPS).
at _____

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

II. ISSUE(S) AND REQUESTED RELIEF

As summarized in the Prehearing Order, and as discussed further at the outset of the Due Process Hearing, the following issues were presented for determination:

Whether DCPS has denied the Student a FAPE when it —

- (a) determined that _____ Academy would be the Student's interim placement despite finding his actions to be a manifestation of his disability;
- (b) failed to provide any services to the Student for approximately three weeks; and
- (c) failed to identify an appropriate placement after the MDT determined in December 2008 that _____ was not appropriate for the Student.

As relief, the complaint requests that DCPS be ordered: (1) to convene an MDT/IEP meeting to develop an IEP that accurately reflects the Student's needs; (2) to provide compensatory education;¹ and (3) to fund the Student's placement at _____

¹ Petitioner's counsel dropped the claim for compensatory education at hearing. She stated that Petitioner was seeking prospective relief only.

III. FINDINGS OF FACT

1. The Student is a year old resident of the District of Columbia whose date of birth is . The Student attends , and is currently repeating the grade for the 2008-2009 school year. -2; *DCPS-1*; *Parent Testimony*. Prior to attending the Student attended a private school for students with special needs. *Parent Testimony*.

2. The Student has been determined to be eligible for special education and related services as a child with a primary disability of Emotional Disturbance (“ED”). -2; *DCPS-1*. He has a current IEP that provides for 27.5 hours per week of specialized instruction, along with 60 minutes per week of behavioral support services. *DCPS-1*. The setting for services specified in the IEP is “Outside General Education.” *Id.*

3. On or about October 14, 2008, the Student’s Multi-disciplinary Team (“MDT”) met to determine if the Student’s behavior was a manifestation of his disability. The team included the parent, the SEC at and the DCPS psychologist, in addition to the special education teacher, general education teacher, assistant principal, and social worker. 1. The MDT determined that the Student’s actions were a manifestation of his disability. *Id.*, p. 2.

4. At the 10/14/08 meeting, the MDT also noted that the Student’s IEP was up for annual review. -1 (MDT meeting notes), p. 3. The social worker expressed concern regarding the Student’s placement at *Id.*, p. 2. The team also heard a report that the DCPS Compliance Specialist was “concerned about transition to and the reduction of services,” and “recommends increasing hours of specialized instruction from 15 to 20 hours per week.” *Id.*, p. 3. The team was informed that the Compliance Specialist “also recommends an FBA be conducted and a BIP developed and implemented.” *Id.* The team was to review the Student’s progress and present the FBA/BIP within 30 days. *Id.* It was also determined that would “draft a new IEP” and that “30 days from now after implementing new interventions, a meeting will be scheduled for a new placement if progress is not made.” *Id.*, p. 5.

5. On or about November 13, 2008, the MDT met “to develop IEP and review recent incidents in building and possibly discuss placement.” -4 (MDT meeting notes), p. 1. The team considered a draft IEP providing for 15 hours per week of specialized instruction and one hour per week of behavioral support services. -2. DCPS also completed an FBA and developed a BIP. -3. The team decided that the ED determination should remain, and the Student’s behavior was seen as a manifestation of his disability. -4 (MDT meeting notes), p. 2. Another meeting was scheduled for 12/12/08. *Id.*

6. On or about December 12, 2008, the MDT met as scheduled to determine placement and again discuss whether the Student’s violations of the student code of conduct were a manifestation of his disability. -5 (MDT meeting notes). The team agreed that the Student’s behavior was a manifestation of his disability (ED). *Id.*, p. 2. Additionally, the MDT determined that a change of placement was necessary to provide the Student with a FAPE. The

MDT agreed that the Student needed a more restrictive, smaller academic environment to be successful. *Id.*, pp. 2-3. Placement recommendations included smaller setting, smaller classrooms, school-wide behavior intervention plan, and designated cooling-off area. *Id.*, p. 4.

7. At the 12/12/08 meeting, the MDT also increased the Student's hours of specialized instruction to 27.5. -5, p. 4. The increased hours have been reflected in the Student's current IEP. *See DCPS-1*, p. 3.

8. On or about 12/12/08, DCPS issued a Prior to Action Notice indicating that the Student's placement was being changed from "General Education" to "Special Education," but without specifying a location of services. 6. The notice stated that the "Student needs a change of placement due to continued behavioral and academic concerns. Student will be placed in an interim placement while DCPS determines placement." *Id.* The option of "keeping student at [redacted] was considered and rejected due to "continued academic failure and danger to self and community." *Id.*

9. Despite determining that the Student's behavior was a manifestation of his disability, [redacted] staff spoke with a representative from DCPS and determined that the Student would attend [redacted] Academy, a school for children who have been suspended or expelled from other DCPS schools. Petitioner disagreed with this decision, but DCPS determined that the Student would be placed at [redacted] on an interim basis until DCPS could identify a permanent appropriate placement. *See* -5, p. 2; *Parent Testimony*.

10. Petitioner and the Student's caseworker (Mr. Gibson) tried several times to enroll the Student at [redacted] Academy. However, it took over three weeks for [redacted] to obtain the necessary paperwork, and DCPS provided no educational services to the Student during that time. *See* -7 (1/8/09 letter from Petitioner's attorney to [redacted] SEC); *Parent Testimony*; *Caseworker Testimony*.

11. The Student eventually attended [redacted] for 45 days, from mid-January until he was required to depart on or about March 18, 2009. *See Parent Testimony*. No one from DCPS contacted the Student concerning a permanent placement/location when he departed *Id.*

12. As of the filing of the complaint in this case – approximately a month after the Student was removed from [redacted], four months after the 12/12/08 meeting, and six months after the 10/14/08 meeting – DCPS still had not identified an appropriate educational placement/location for the Student. As of the date of the June 4 hearing, DCPS still had not formally notified Petitioner of a proposed placement/location or scheduled an MDT meeting for that purpose. DCPS did not identify [redacted] Academy as a proposed placement/location of services until a few days before the hearing. *See DCPS Testimony*.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see also Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action

and/or inaction, including failures to develop an appropriate IEP and/or to provide an appropriate placement.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3. The standard generally is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

B. Issues/Alleged Denials of FAPE

3. The Hearing Officer concludes that Petitioner has met his burden of proof on the issues presented. The preponderance of the evidence shows that DCPS has denied the Student a FAPE by: (a) determining that _____ Academy would be the Student's interim placement despite finding his actions to be a manifestation of his disability; (b) failing to provide any services to the Student for nearly a month during December 2008 and January 2009; and (c) failing to identify an appropriate placement/location of services under the IEP after determining that _____ was not appropriate for the Student.

4. On the first issue, DCPS properly convened a meeting to make a "manifestation determination" and determined that the Student's behavior was a manifestation of his ED disability, as provided in Section 300.530(e). As a result, IDEA required DCPS to then conduct an FBA/BIP and "return the child to the placement from which the child was removed." 34 C.F.R. §300.530(f); *see* 20 U.S.C. §1415(k)(1)(F). Instead, DCPS removed the Student to an interim alternative educational setting _____ for 45 days, even though none of the three "special circumstances" specified in Section 300.530(g) applied here. *See* 34 C.F.R. §300.530(g). The Hearing Officer finds that this was an inappropriate placement, in violation of IDEA, and constituted a substantive denial of FAPE in that (*inter alia*) it impeded the Student's right to a FAPE and caused a deprivation of educational benefit. *See id.* §300.513(a)(2).

5. DCPS exacerbated this problem by then failing to provide the necessary paperwork to enable the Student to be admitted to _____ for approximately three school weeks. This left the Student without any educational placement or services at all for a not insignificant period of time, which may well be material "in terms of impact on the child's education." *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007); *see also Blackman v. District of Columbia*, 185 FRD 4, 7 (D.D.C. 1999) ("a few months can make a world of difference in harm to a child's educational development").

6. Finally, as reflected in the above Findings of Fact, DCPS clearly failed timely to provide the Student with an appropriate educational placement after determining that _____ was inappropriate. This was effectively conceded by DCPS counsel at the PHC and at the hearing. The Hearing Officer concludes that this failure constituted a clear, substantive denial of FAPE, which could not be remedied simply by an eleventh-hour identification of a new proposed school placement/location on the eve of hearing. If DCPS defaults in its obligations to identify a proposed placement/location of services, or otherwise cannot provide a public school having the services and/or placement the child needs within a reasonable period of time, DCPS should be required to place the child at a private school and pay the child's tuition expenses. *See Roark v. District of Columbia*, 460 F. Supp. 2d 32, 35 (D.D.C. 2006), *citing Burlington v. Department of Education*, 471 U.S. 359, 369 (1985).

7. As the U.S. Court of Appeals for the D.C. Circuit has explained, "an award of private-school placement is not...retroactive relief designed to compensate for *yesterday's* IDEA violations, but rather prospective relief aimed at ensuring that the child receives *tomorrow* the education required by IDEA." *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005). Thus, placement awards "must be tailored to meet the child's specific needs" through a fact-intensive inquiry. *Id.* at 11-12. "To inform this individualized assessment, '[c]ourts fashioning [such] discretionary equitable relief under IDEA must consider all relevant factors.'" *Id.* at 12, quoting *Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993); see also *Reid v. District of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

8. The parent's proposed placement to _____ meets the criteria for judicial placement determinations and appears to be appropriately "tailored to meet the child's specific needs." *Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005); *Roark v. District of Columbia*, 460 F. Supp. 2d 32, 35 (D.D.C. 2006). See *Parent Testimony*; *Academy Testimony*; see also _____ -5 (MDT's noting that the Student made significant progress in a smaller, more restrictive environment at _____ prior to attending _____)

V. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ordered:

1. Petitioner's requests for relief be, and hereby are, **GRANTED**, as set forth herein;
2. DCPS shall immediately place the Student at _____ beginning with the summer (extended school year) program in late June 2009 and continuing into the 2009-2010 school year, subject to the further MDT meeting under paragraph 3.
3. DCPS shall convene an MDT meeting within 30 days of when the Student starts attending _____ in order to review and revise, as appropriate, the Student's IEP to provide for the special education and related services at _____
4. This case shall be, and hereby is, **CLOSED**.

Dated: June 14, 2009

/s/



Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any State court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).